question (Pet. 3)[2] in that the question's simplistic approach clouds the issues included therein. The following two questions are more properly brought before this Court under the general heading, "I. The Lower Court Properly Considered the Complaints' Allegations.":

A. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R.Civ.P., motion to dismiss?

B. Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ.P., motion to dismiss?

2. Respondents are satisfied with petitioners' second question (Pet. 3) relating to the lower court's subject matter jurisdiction over petitioners' Title 42 U.S.C. Section 1983 causes of action, and will consider the issue under the general heading, "III. The Lower Court Lacked Subject Matter Jurisdiction." The question of the trial court's subject matter jurisdiction over petitioners' diversity causes of action is also considered under this general heading.

3. Respondents are satisfied with petitioners' third question (Pet. 3-4) relating to the doctrine of executive immunity and will consider the issue under the general heading, "II. The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could Be Granted." The doctrine of executive immunity *vis-à-vis* petitioners' diversity causes of action is also considered under this general heading.

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[2]For purposes of this brief in opposition, "Pet." together with Arabic numerals refers to pages of petitioners' petition for a writ of certiorari, filed herein; "Sch. App." together with Arabic numerals refers to pages of the appendix to the Scheuer petition for a writ of certiorari (*Scheuer, etc. v. Rhodes, et al.*, United States Supreme Court, Case No. 72-914), and incorporated by reference into the Krause and Miller petition herein.

4. Respondents are satisfied with petitioners' fourth question (Pet. 4) relating to their diversity causes of action. The substance of this question will be considered under petitioners' second and third questions as above defined.

5. Respondents are not satisfied with petitioners' fifth question in that the question's substance is not consistent with the holding of the lower court. The following proposition is more properly brought before this Court for review:

V. The Federal Government Is an Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

UNITED STATES CODE, TITLE 28

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded

as rules of decision in civil actions in the courts of the United States, in cases where they apply.

UNITED STATES CODE, TITLE 32

Section 108:

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:

Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION

Article I, Section 16:

* * *

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

Article III, Section 10:

He (Executive) shall be commander-in-chief of the military and naval forces of the State, except when they shall be called into the service of the United States.

Article IX, Section 3:

The Governor shall appoint the Adjutant General, Quartermaster General, and such other staff officers, as may be provided for by law. Majors General, Brigadiers General, Colonels, or Commandants of Regiments, Battalions, or Squadrons, shall, severally, appoint their staff, and Captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The Governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the Militia, to execute the laws of the State, to suppress insurrection, and repel invasion.

OHIO REVISED CODE

Section 3341.01:

The Bowling Green state normal school, and the Kent state normal school, established under 101 O. L. 320, shall be known as the 'Bowling Green State University' and the 'Kent State University,' respectively.

Section 3341.02 (B):

The government of Kent state university is vested in a board of nine trustees, who shall be appointed by the governor, with the advice and consent of the senate.

Section 3341.04:

The boards of trustees of Bowling Green state university and Kent state university, respectively, shall elect, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary by said boards. The boards shall do all things necessary for the proper maintenance and successful and continuous operation of such universities.

Section 5919.02:

All commissioned officers of the Ohio national guard shall be appointed by the governor as commander in chief, upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty, and be commissioned according to grade in the department, corps, or arm of the service in which they are appointed.

Section 5919.05:

Commissioned officers of the Ohio national guard shall take and subscribe to the following oath of office: 'I, ..., do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Ohio, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States and of the Governor of the state of Ohio; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of ..... in the National Guard of the United States and of the state of Ohio, upon which I am about to enter, so help me God.'

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99(A) *infra.*]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends; may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.37:

When a member of the organized Militia is ordered to duty by State authority during a time of public danger,

he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Ohio Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF CASE

Respondents are satisfied with petitioners' *resumé* of the case (Pet. 6-8), excepting the adversary comment contained therein and subject to the following two corrections. First, the court of appeals did not hold that, "the *defendants* enjoyed the defense of *absolute* personal immunity . . . (Pet. 8; emphasis added)." Rather, the lower court held that Respondent Rhodes had *absolute* immunity (Sch. App. 12a) but that the remaining respondents possessed only a *qualified* personal immunity (Sch.App. 20a). Secondly, petitioners are incorrect when they assert that the lower courts failed to consider their diversity causes of action (Pet. 8). Both the district court (Pet. 37-44) and the court of appeals (Sch.App. 4a-15a) considered the Eleventh Amendment and Article I, Section 16, of the Ohio Constitution which prohibited the federal courts from exercising diversity jurisdiction over petitioners' wrongful death actions.

Additionally, respondents wish to emphasize and bring to this Court's attention certain uncontradicted realities present before the trial court.

1. There were but seven defendants within the personal jurisdiction of the trial court, and upon whom the judg-

ment of the court of appeals is premised; to-wit, Governor Rhodes, Adjutant General Del Corso, Assistant Adjutant General Canterbury, Major Jones, Captains Martin and Srp, and President White (Sch.App. 20a).

2. Presented to the trial court as attachments to respondents' motions to dismiss were relevant Executive Proclamations evidencing that, at the time petitioners' alleged causes of action arose, the Ohio National Guard, including the respondents herein, had been called to active duty pursuant to the law of Ohio (Sch.App. 3a, 23a-26a).[3]

3. Further, the relevant Executive Proclamations mentioned above factually demonstrated to the trial court that a condition of insurrection and rampage existed at the Kent State University, and that, in response thereto, the Ohio National Guard was ordered by Governor Rhodes to take that action necessary to protect life and property on and to restore order to the Kent State University (Sch. App. 3a; 23a-26a).

4. Petitioners' complaints acknowledge that, at the time petitioners' alleged causes of action arose, the respondents were all agents of the State of Ohio; that respondents were ordered to active duty by the Governor of Ohio; and that none of the respondents herein fired the shots, killing petitioners' decedents (Pet. 47-49, 53-54).

5. Attached to respondents' motion to dismiss in the *Krause* case were the affidavits of Respondents Del Corso and Canterbury which stated:

"4. At the time plaintiff's alleged cause of action arose, I (Respondent Del Corso) was in Columbus,

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[3]It is to be noted that under respondents' Rule 12b(6), Fed.R.Civ.P., motions to dismiss, applying Rule 56 procedures, the attestations set forth under paragraph 2, 3, and 5, were not contradicted, other than by allegations of the complaint, and therefore must be taken as true under Rule 56 (e).

Ohio, and not on the Kent State Campus (APPENDIX, p. 44 *infra*)."

"4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I (Respondent Canterbury) made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause (APPENDIX, p. 45 *infra*)."

SUMMARY OF ARGUMENT

The ARGUMENT, hereinafter set forth, first considers the allegiance due the allegations of petitioners' complaints when confronted by a Rule 12b(1), Fed.R.Civ.P., motion to dismiss (ARGUMENT, I.A., pp. 12-13 *infra*). Thereafter, a Rule 12b(6), Fed.R.Civ.P., motion to dismiss will be similarly considered and distinguished (ARGUMENT, I.B., pp. 13-15 *infra*).

Secondly, respondents' ARGUMENT will concern the propriety of the lower courts' ruling that (1) petitioners' Title 42 U.S.C. Section 1983 causes of action and (2) petitioners' diversity causes of action failed to state claims upon which relief could be granted; to-wit, the applicability of the doctrine of executive immunity. The substance of this discussion will be considered relative to (A.) Respondent Rhodes, and, thereafter, (B.) relative to the remaining respondents. (ARGUMENT, II., A., B., pp. 15-21 *infra*). Thirdly, and notwithstanding this Court's disposition as to the doctrine of executive immunity issue, the ARGUMENT of respondents will demonstrate that the lower courts lacked subject matter jurisdiction over, both, petitioners' (A.) Section 1983 causes of action and (B.) petitioners' diversity causes of action pursuant to the Eleventh Amendment and Article I, Section 16, of the Ohio Constitution. (ARGUMENT, III., A., B., pp. 21-33 *infra*).

Further, and again separate and independent from the above, the ARGUMENT, hereinafter set forth, demonstrates that certain allegations of petitioners' complaints are properly dismissed since these allegations involve non-justiciable political questions. (ARGUMENT, IV., pp. 34-39 *infra*). Finally, these non-justiciable issues will be shown properly dismissed since the Federal Government is an indispensable party thereto (ARGUMENT, V. pp. 39-41 *infra*).

ARGUMENT

I. *The Lower Court Properly Considered the Complaints' Allegations.*

The substance of petitioners' first question (Pet. 3) is properly separated and viewed in relation to: (A.) Rule 12b(1), Fed.R.Civ.P., motions to dismiss, and (B.) Rule 12b(6), Fed.R.Civ.P., motions to dismiss. The propriety of this division is apparent from the lower appellate court's affirmance of the complaints' dismissal upon two independent bases; to-wit, the federal courts' lack of subject matter jurisdiction (Eleventh Amendment), and the complaints' failure to state a claim upon which relief can be granted (Executive immunity) (Pet. 7; Sch.App. 20a).

A. *Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R.Civ.P., motion to dismiss?*

It is well-established that courts of limited jurisdiction, including the federal courts of this country, may weigh the merits of a motion putting to issue the court's subject matter jurisdiction. Rule 12h(3), Fed.R.Civ.P., endorses this basic precept:

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of

> the subject matter, the court shall dismiss the action."

This Court, interpreting the predecessor to Rule 12h(3), stated the rule in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 184 (1935):

> "The trial court is not bound by the pleadings of the parties, but may, on its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist.'"

See also Wetmore v. Rymer, 169 U.S. 115 (1898); *Gilbert v. David*, 235 U.S. 561 (1915); *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921); 5 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil Section 1350 (1969); 32 Am. Jur. 2d *Federal Practice and Procedure* 170-172 (1967).

Hence, notwithstanding petitioners' negative, *but unsupported*, criticism of the lower courts' factual resolutions (Pet. 9-11, 15) contrary to their complaints' allegations, it is established that the courts were empowered to "inquire into the facts as they really exist(ed)" when considering respondents' Rule 12b(1), motions to dismiss. The determination of the lower court dismissing petitioners' actions for lack of subject matter jurisdiction, pursuant to Rule 12h(3), will hereinafter be considered (ARGUMENT, III. pp. 21-34 *infra*).

B. *Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R.Civ.P., motion to dismiss?*

The answer to the above posed question is "yes" *if* proper evidence has *not* been introduced to contradict the allegations, but "no" *if*, as in these cases, evidence has been introduced pursuant to the procedures of Rule 56, Fed.R. Civ.P.

Rule 12b, Fed.R.Civ.P., provides that when presented a Rule 12b(6), motion to dismiss, trial courts are to treat evidence introduced therewith in accordance with the procedures of the summary judgment provision. Rule 56(e) states, in no uncertain terms:

> " . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the case at hand, there is no question but that relevant Executive Proclamations, sworn to as affidavits, were attached to respondents' Rule 12b(6), motions to dismiss. These affidavits established, *inter alia*, that a condition of insurrection and rampage existed at the Kent State University, May 4, 1970, and that, in response thereto, the Ohio National Guard was ordered by Governor Rhodes to take action necessary to protect life and property on and to restore order to the Kent State University (Sch.App. 3a; 23a-26a).

The federal courts have uniformly held that Rule 12b(6) motions to dismiss admit all *well-pleaded* factual allegations but do not admit legal conclusionary allegations which the courts will judicially notice to be unfounded, *i.e.*, allegations which are unsupported and unsupportable. *See, e.g., International Bk. of Miami v. Banco de Economias y Prestamos*, 55 F.R.D. 180 (1972); *Blackburn v. Fisk University*, 443 F.2d 121 (6th Cir. 1971); *Interstate Nat. Gas Co. v. Southern California Gas Co.*, 209 F.2d 380 (9th Cir. 1953); *Nev.-Cal. Electrical Securities Co. v. Imperial*

Irr. District, 85 F.2d 886 (9th Cir. 1936), *cert. denied*, 300 U.S. 662 (1937).

After quoting from the lower courts' decisions, petitioners state:

> "It is incredible that such blatant factual assertions are advanced by "federal magistrates, *without the benefit of applicable sworn testimony*, relying presumably instead upon presentations of this incident in the news media . . . . " (Pet. 10; emphasis added)

The "blatant facts" need not have been gleaned by the lower courts through judicial notice since the uncontradicted Executive Proclamations of Governor Rhodes encompassed all the realities of May 4, 1970, of which judicial notice was taken. Because the Executive affidavits were not contradicted by the affirmative evidence provided by Rule 56, the realities, therein disclosed, were properly accepted as true by the lower courts. As stated in Rule 56, " . . . an adverse party may not rest upon the mere allegations or denials of his pleading . . ." It is important to note that the petitioners' "facts" (Pet. 11-15) were neither presented to the lower court under the terms of Rule 56 nor are they unquestioned realities of which a court could take judicial notice. [Art. II, Rule 201(b), *Proposed Federal Rules of Evidence*, 34 L.Ed. 2d 1, at 12 (1973)].

The propriety of the lower courts' judgment dismissing the complaints pursuant to Rule 12b(6), Fed.R.Civ.P., will next be considered.

II. ***The Lower Court Properly Dismissed the Complaints for Their Failure to State a Claim Upon Which Relief Could be Granted.***

Petitioners' third reason for allowance of the writ (Pet. 19-21) is predicated upon a conclusion never drawn by the lower court. The court of appeals did not hold that all

respondents possessed absolute immunity to suit. Rather, the majority concluded that, under the facts at bar, Governor Rhodes had *absolute* immunity (Sch.App. 12a) and that the remaining respondents were protected by a *qualified* immunity to petitioners' Section 1983 causes of action (Sch.App. 20a). Thus, the immunity of these state officials will hereinafter be considered in the light of this distinction.

Before considering the specific issues presented, respondents respectfully call this Court's attention to the uncontradicted factual realities before the lower courts. (STATEMENT OF CASE, para. 1-5, pp. 9-11 *supra*)

A. *Respondent, Governor James Rhodes.*

1. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?
2. Under the facts of this case, does the Governor of the State of Ohio possess *unqualified* executive immunity for his discretionary acts *vis-à-vis* a wrongful death action brought under diversity jurisdiction?

These specific issues will be considered in a separate brief in opposition filed on behalf of Respondent, Governor James Rhodes.

B. *The Remaining Respondents.*

1. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-à-vis* a 42 U.S.C. Section 1983 cause of action?

Petitioners contend that the lower court's executive immunity determination is in conflict with a consistent line of decisions adopting the position that there is no executive

immunity to a Section 1983 cause of action (Pet. 20). Respondents submit that petitioners' statement of law is totally inaccurate.

In support of petitioners' proposition the following cases are cited (Pet. 20): *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1966) (1983 action by an inmate of a state mental institution against officers and supervising psychiatrist of the institution); *Birnbaum v. Trussel*, 347 F.2d 86 (2nd Cir. 1965) (1983 action by doctor against commissioners of city department of hospitals and union president for dismissal on grounds of racial prejudice); *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Cir. 1968) (1983 action by doctor against hospital commission and individual commission members); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968) (1983 action by former probationary teachers against superintendent and elected members of board of education); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968) (1983 action against police officer for false arrest); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968) (1983 action against sheriff for holding prisoner in jail after charges had been dismissed); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (1983 action by prisoner against state commissioner of correction and two prison wardens); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted sub nom., District of Columbia v. Carter*, 404 U.S. 1014 (1972) (1983 action against precinct captain and police chief and the District of Columbia); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971), *cert. denied*, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972) (1983 action by minor prisoner against trusty, youth court judge, municipal court judge, superintendent of county farm, member of board of supervisors of county, county sheriff, and sheriff's officials); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972)

(1983 action against FBI agent for false imprisonment and malicious prosecution).

Looking to these cases cited by petitioner for the proposition that there is a consistent line of decisions adopting the position that there is no executive immunity available against an action brought under Section 1983 (Pet. 14), respondents submit that petitioners' contention is not even remotely supported by the cases cited. Neither *Meredith*, nor *Whirl*, nor *Joseph*, nor *Sostre* (except in the footnote, hardly characterized as the holding of a court) discuss any issue concerning executive immunity and consequently have no relevance to the case at bar. *Jobson*, *McLaughlin*, *Carter*, *Roberts* and *Jones* all recognize the existence of executive immunity as a defense to a Section 1983 action but would apply the immunity sparingly. It must be noted that these cases all recognize the viability of the doctrine of executive immunity under a Section 1983 cause of action. The holding of these cases is entirely consistent with the holding of the lower court herein. The *Birnbaum* case is distinguishable from the case at bar since it was brought on the grounds of racial discrimination which would necessarily involve different policy considerations. *See*, Comment, *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 Calif. L.Rev. 887 (1956).

Contrarily, a consistent line of cases hold state governmental officials immune to Section 1983 causes of action for discretionary acts done within the scope of their authority. *See, e.g., Pierson v. Ray*, 386 U.S. 547 (1967); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967); *Lumbermens Mutual Casualty Company v. Rhodes*, 403 F.2d 2 (10th Cir. 1968), *cert. denied*, 394 U.S. 965 (1969); *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968); *United States v. Tarumianz*,

141 F. Supp. 739 (1956). The policy considerations calling for immunity to be given officials for their discretionary acts are firmly entrenched in previous decisions of this Court and federal appellate courts. *See, e.g., Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959); *Dalehite v. United States*, 346 U.S. 15 (1953); *Spalding v. Vilas*, 161 U.S. 483 (1896); *David v. Cohen*, 407 F.2d 1268 (D.C. Cir. 1969); *Garner v. Rathburn*, 346 F.2d 55 (10th Cir. 1965); *Blitz v. Boog*, 328 F.2d 596 (2nd Cir. 1964), *cert. denied*, 379 U.S. 855 (1965); *Brownfield v. Landon*, 307 F.2d 389 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 924 (1962); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2nd Cir. 1962), *cert. denied*, 374 U.S. 287 (1963); *Bershad v. Wood*, 290 F.2d 714 (9th Cir. 1961); *Fortier v. Hobby*, 262 F.2d 924 (D.C. Cir. 1959); *O'Campo v. Hardisty*, 262 F.2d 621 (9th Cir. 1958); *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). These very same policy considerations are statutorily embodied in the Federal Tort Claims Act. Title 28 U.S.C. Section 2680(a). Though the above citations by no means purport to be a complete list of cases recognizing tort immunity for the discretionary acts of governmental officials, the lower court's finding that the complaints failed to state a claim upon which relief could be granted (*i.e.*, the respondents were immune to suits under the facts of the case) can hardly be characterized as a "new extension" of immunity which "plainly flaunts the present law." (Pet. 21).

Respondents submit that the lower court's executive immunity determination, characterized by petitioners as an unabashed departure from established law (Pet. 19), was entirely consistent with the above authorities.

2. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General

of the State of Ohio, and the named officers of the State of Ohio's organized Militia possess *qualified* executive immunity *vis-a-vis* a wrongful death action brought under diversity jurisdiction?

Petitioners first assert that the court of appeals failed to consider their diversity causes of action (Pet. 22). This contention is simply not true. To the contrary, the court of appeals held that federal courts were prohibited from exercising jurisdiction over petitioners' diversity causes of action under both the Eleventh Amendment and the Ohio Constitution, Article I, Section 16 (ARGUMENT, III, A, B., pp. 21-33 *infra*). Secondly, petitioners are incorrect when they assert that Section 5923.37, of the Ohio Revised Code, is a waiver of Ohio's immunity to suit, conferring jurisdiction upon the federal courts (Pet. 23). Section 5923.37 is absolutely unrelated to Ohio's immunity to petitioners' causes of action (ARGUMENT, III, C., pp. 33-34 *infra*).

Assuming, *arguendo*, that the trial court had had jurisdiction over petitioners' diversity causes of action, still their complaints failed to state a claim upon which relief could be granted. To be applicable, Section 5923.37, Ohio Revised Code, requires that the wrongdoer be at the scene of the disorder and that his conduct be willful or wanton. The uncontradicted affidavit of Respondent Del Corso attests to the fact that he was not at Kent State when petitioners' alleged causes of action arose and, therefore, he does not come within the purview of Section 5923.37 (APPENDIX, p. 44 *infra*). Likewise, the affidavit of Respondent Canterbury affirms that he did nothing to cause the fatal shots to be fired and therefore he is outside this section (APPENDIX, p. 45 *infra*).

Further, petitioners' complaints evidence that none of the respondents at bar fired the fatal shots. Members of the Ohio National Guard were agents of the State and not

agents of the respondents at bar. *Maryland v. United States*, 381 U.S. 41 (1965). Consequently, there can be no vicarious liability. *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); *Dunham v. Crosby*, 435 F.2d 1177 (1st Cir. 1970); II Harper & James *Law of Torts*, §29.8, pp. 1633-1634. The question of whether the actions of those who fired the shots were willful or wanton is clearly foreign to the petition before this Court.

In reality, petitioners are requesting this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the issue of whether Section 5923.37 of the Ohio Revised Code conferred diversity jurisdiction upon the trial court. It is obvious that the diversity question was resolved on the grounds that the suits are barred by the Eleventh Amendment and Article I, Section 16 of the Ohio Constitution. Hence, any decision of the lower court with regard to Section 5923.37 would have been dicta and not determinative of the case. It cannot be over emphasized that petitioners are not presenting a federal question by challenging the constitutionality of Section 5923.37 as repugnant to the United States Constitution, nor are petitioners challenging a lower court's interpretation of the statute as being in conflict with Ohio law. Although there are presently pending numerous Ohio state court wrongful death and personal injury actions arising out of the Kent State tragedy, no Ohio court has yet had the opportunity to interpret Section 5923.37. Surely, this Court is not the proper forum for this section's introduction to judicial scrutiny.

III. *The Lower Court Lacked Subject Matter Jurisdiction.*
A. *Petitioners' Title 42 U.S.C. §1983 Causes of Action; Title 28 U.S.C. §§1331, 1343.*

The trial court's lack of subject matter jurisdiction is separate from and independent of the failure of petitioners'

complaints to state a claim upon which relief can be granted. However, if this Court should determine the doctrine of executive immunity inapplicable to any one of the respondents, the trial court's lack of subject matter jurisdiction becomes even more apparent. This functional reality will be demonstrated herein.

The Eleventh Amendment of the United States Constitution, states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State."

The Eleventh Amendment, being part of the Supreme Law of the Land, cannot be diminished by congressional enactment. Congress did not and could not expose the states to federal jurisdiction by creating Section 1983 causes of action and providing the corollary jurisdictional provisions (28 U.S.C. §§1331, 1343). *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 186 (1964); *Ex parte New York*, 256 U.S. 490, 497-498 (1921); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

Further, it is established that the Eleventh Amendment cannot be avoided by naming nominal party defendants when the essential nature and effect of the lawsuit affects a sovereign state. *Ford Motor Co. v. Treasury Department*, 322 U.S. 459, 464 (1945); *Ex parte New York, supra*, 256 U.S. at 500; *Re Ayers*, 123 U.S. 443, 492 (1887). The relevant criteria for determining when a lawsuit's essential nature and effect results in the action being against a sovereign are well summarized by this Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, *or* inter-

> fere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738, 91 L.Ed. 1209, 1215, 67 S.Ct. 1009 (1947), or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Commerce Corp., supra* (337 U.S. at 704); *Re New York*, 256 U.S. 490, 502, 65 L.Ed. 1057, 1062, 41 S.Ct. 588 (1921)." (Emphasis added)[4]

It is important to note that these "tests" are stated in the disjunctive, and therefore, if any one of the standards is met in a given case, the suit must be held to be against the sovereign. These determinations are relevant and crucial to the achievement of the object and purpose underlying the Eleventh Amendment as defined by this Court in *Re Ayers, supra*, 123 U.S. at 505-506:

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitu-

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[4] Although *Dugan v. Rank*, 372 U.S. 609 (1963) and the tests defined therein, involve the immunity of the Federal Government to suit, the immunity of the States to federal suit is determined by applying the same tests, gauging the impingement of sovereign powers. This conclusion is obvious from the broad language in *Dugan* summarizing the various integrant parts of the rule, and from this Court's citation of *Re New York*, 256 U.S. 490 (1921), an Eleventh Amendment case. *See Tindal v. Wesley*, 167 U.S. 204, 213 (1897).

> tional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

In accordance with the established law set forth above, the Eleventh Amendment prohibited the trial court from acquiring jurisdiction over petitioners' stated causes of action.

Before the trial court, when ruling upon respondents' Rule 12b(1), motions to dismiss, was the factual matter alleged in petitioners' complaints and contained in the Executive Proclamations attached to the motions *(See* STATEMENT OF CASE, pp. 9-11 *supra*). Also, present in the trial court was the law of Ohio defining the legal obligations of respondents to the sovereign.[5] The trial court, weighing these realities (ARGUMENT, I.A. pp. 12-13 *supra*) concluded, under the applicable standards announced by this Court in *Dugan v. Rank, supra*, that it was without subject matter jurisdiction. This judgment was entirely consistent with the prior decisions and reasoning of this Court, and demanded by the Eleventh Amendment.

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[5]The Ohio Constitution places upon the Governor of Ohio the responsibility of Commander-in-Chief of the Ohio National Guard (Ohio Const. art. III, sec. 10) and the obligation of appointing the Adjutant General and Assistant Adjutant General of the state's Militia (Ohio Const. art. IX, sec. 3). Further, the duty of appointing line and staff officers and ordering them to service when necessary "to execute the laws of the state, to suppress insurrection, and repel invasion," is posited with the Governor (Ohio Const. art. IX, sec. 4).

The statutory law of Ohio states that all commissioned officers of the Ohio National Guard shall be appointed by the Governor, and obligates all commissioned officers to swear their allegiance to the state, and to obey the orders of the Governor (Ohio Rev. Code §§5919.02, 5919.05). The Governor has the sovereign's sanction to order the Ohio National Guard, "to aid civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion . . ."

(footnote continued)

Ohio would be restrained from acting, and the public administration of the law greatly curtailed if the federal courts were to assume jurisdiction over petitioners' causes of action. Although not factually identical, the wisdom of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), attests to these dire effects:

> ". . . it is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. (177 F.2d at 581)"

In the case of *Barr v. Matteo*, 360 U.S. 564 (1959), this Court recognized the inevitable restraint on the sovereign generated by lawsuits against the sovereign's agents:

(Ohio Rev. Code §§5923.21, 5923.231). No officer may refuse to appear when ordered by the Governor to suppress or prevent riot or insurrection (Ohio Rev. Code §5923.22) in accordance with the above. If an officer of the Ohio National Guard fails to obey the Governor's order, he may be fined $1,000 or imprisoned six months, or both [Ohio Rev. Code §5923.99(A)].

Relative to the status and obligations of Respondent White, President of Kent State University, the statutory enactments of the sovereign designate the Kent State University a state institution (Ohio Rev. Code §3341.01) and vest its government in a board of trustees, appointed by the governor with the advice and consent of the senate [Ohio Rev. Code §3341.02(B)]. Further, this board of trustees is responsible to the sovereign for the election of a president and for the successful operation of the university. The President of Kent State University is, consequently, responsible to the State of Ohio through the board of trustees to do all things necessary for the proper maintenance and successful and continuous operation of such university (Ohio Rev. Code §3341.04).

"We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. (360 U.S. at 564-565)

* * *

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: (Quoting *Gregoire v. Biddle, supra*) (360 U.S. at 571)

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"It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be

> prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings. (360 U.S. at 576)"

Under the reasoning of *Gregoire* and *Barr*, the State of Ohio would be restrained from acting in time of rampage and insurrection, and the public administration of this sovereign's laws would be greatly impeded if the federal courts were to assume subject matter jurisdiction over petitioners' causes of action. On balance, before the trial court, was the State of Ohio's ability to protect life and property within her bounds.

If in times of insurrection and emergency demanding discretionary acts, Ohio's public officials, functioning under their unchallenged obligation to the sovereign, could, at the stroke of a vindictive plaintiff's pen, be subjected to the irrationality of hindsight and *ex post facto* speculation, this sovereign would be hard pressed to find responsible officials to act. This reality, manifest in the trial court and court of appeals, prohibited the federal court from acquiring subject matter jurisdiction over petitioners' actions. If this Court were to determine that the doctrine of executive immunity is not available to shield executive officials from the inevitable lawsuits, the adverse effects upon the sovereign become even more demonstrable.

Rather than departing from the established law, the lower courts' judgment was mandatory: under the facts at bar; in accordance with the Eleventh Amendment; the object and purpose behind this Amendment; and the tests announced by this Court in *Dugan v. Rank, supra*. The trial court, balancing the facts at bar, was bound by the Supreme Law of the Land.

Ex parte Young, 209 U.S. 123 (1908), established a much narrower rule than advanced by petitioners, and the dissenting judge in the court of appeals. That case stands for the limited proposition that,

> "... individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and *who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.*" *Ex parte Young, supra*, 209 U.S. at 155-156 (Emphasis added).

Young, of course, involved an injunction action brought against a state's attorney general seeking to prohibit the *in futuro* enforcement of an unconstitutional state statute. Under the fiction that a state never acts unconstitutionally, this Court held that the injunction was against the attorney general acting on his own frolic. Petitioners' actions are readily distinguishable. Petitioners' lawsuits demand an *ex post facto* evidentiary hearing which, as shown above, is the very evil that would seriously affect Ohio's ability to protect life and property within the state. Further, the fiction of *Young* is irrelevant since the law of Ohio, obligating respondents to act at Kent State University, is not being constitutionally challenged.

The same irrelevancy to the cases at bar characterizes *Georgia R. and Bkg. Co. v. Redwine*, 342 U.S. 299 (1952). In the *Georgia* case, as in *Young*, this Court held that an injunction action, against a state official, to prevent the threatened enforcement of an unconstitutional state statute did not violate the Eleventh Amendment. *Georgia R. and Bkg. Co. v. Redwine, supra*, 342 U.S. at 305. *Ford Motor Co. v. Treasury Department, supra*, however, was de-

termined by this Court to be an action *affecting* the fiscal integrity of Indiana, and consequently barred by the Eleventh Amendment. *Ford Motor Co. v. Treasury Department, supra*, 323 U.S. at 464. There is no language in *Ford* that even implies that the "nature and effect" test is limited to fiscal considerations and therefore, this case is entirely consistent with the diverse tests of *Dugan v. Rank, supra*. Petitioners also cite a motley group of lower court cases (Pet. 17) involving the Eleventh Amendment *vis-à-vis* Section 1983 causes of action. In order not to belabor the point, it can be said generally that in none of these decisions is there any indication that the courts were presented a factual situation analogous to the one at bar, nor do these cases in any way challenge the established law discussed herein.

Judge Celebreeze, dissenting in the court of appeals, concludes that, because petitioners' actions neither seek money damages from the state's treasury nor interfere with Ohio's contract rights, their claims cannot "affect" this sovereign (Sch.App. 41a).[6] Such a narrow approach not only ignores the expressed standards in *Dugan v. Rank, supra*, but is lacking in logic.

This Court, on numerous occasions, has identified the most important function of government to be providing security for the citizenry and the protection of their property. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (dissenting opinion, White, J.); *Lanzetta v. New Jersey*, 306 U.S. 451, 455 (1938); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1927). Further, as recognized by the dissenting judge, this Court has expressly held that if a

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[6]Petitioners advance substantially the same argument, however, they limit the "affect" test even further by including therein only actions which seek judgments against the states' treasuries (Pet. 16-17).

suit seeks damages from a state's treasury (*Ford Motor Co. v. Department of Treasury, supra*) or seeks to compel a state to specifically perform its contract obligations (*Ex parte New York, supra*), the suit must be declared violative of the Eleventh Amendment, notwithstanding the fact that the state was not a named party to the lawsuit. Even ignoring the expressed tests of *Dugan v. Rank, supra,* it most surely follows that if the state's fiscal integrity and immunity to contract obligations are protected, the highest function of state government will be even more zealously insured.

Finally, petitioners' argument that the lower courts' judgment "effectively emasculates the Civil Rights Act of 1871" is incredible (Pet. 17-19). At the time Congress enacted this Civil Rights Act, the Act was either already limited by the Eleventh Amendment, or the Supremacy Clause was negated by Congressional dictate. The dilemma of petitioners has been resolved in the past. There is, of course, the doctrine of *Ex parte Young, supra,* which permits federal mandate to enjoin the enforcement of unconstitutional state statutes. When allegations of a complaint, however, fail to come within the limits of the *Young* doctrine, each factual situation must be analyzed separately; *i.e.*, the tests of *Dugan v. Rank, supra,* must be applied to the circumstances predicating each complaint, with the balance adjudged by the trial court. In those cases in which the trial court determines, as here, that a claimant's Section 1983 action diminishes the object and purpose of the Eleventh Amendment, the complaint must yield to the Supreme Law, and the court must conclude that it is without subject matter jurisdiction.

Petitioners state that,

> ". . . the Eleventh Amendment is at minimum qualified by the subsequent passage of the Four-

> teenth Amendment with respect to the rights of due process of law and equal protection of the laws (Pet. 18-19)."

The logical extension of this proposition is that a sovereign state could be sued *directly* for any alleged act contrary to a citizen's rights to due process or equal protection under the Fourteenth Amendment. The absurdity of this conclusion speaks for itself.

B. *Petitioners' Wrongful Death Causes of Action; Title 28 U.S.C. §1332.*

Initially, respondents incorporate, herein, the first section of this argument (ARGUMENT, III, A., pp. 21-31 *infra*) since Ohio's Eleventh Amendment immunity to suit is dispositive of not only petitioners' Section 1983 causes of action but also petitioners' wrongful death actions brought pursuant to the federal courts' diversity jurisdiction. In addition, the immunity of Ohio, under the Ohio substantive law, is controlling in Ohio's federal fora. Title 28 U.S.C. §1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Article I, Section 16 of the 1851 Constitution of Ohio, as amended in 1912, states in relevant part:

> "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Recently, in another lawsuit arising out of the Kent State tragedy, this Court and the Supreme Court of Ohio, had occasion to consider this provision of the Ohio Constitution. In the case of *Krause Admr. v. Ohio*, 31 Ohio St. 2d 132, 285 N.E. 2d 736, *appeal denied*, U.S. , 34 L.Ed.2d 506; *pet. for reh. denied*, U.S. , 35 L.Ed.2d 208, the Ohio Supreme Court ruled in its syllabus:

> "1. The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly. (*Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102; *Palumbo v. Indus.*

Comm., 140 Ohio St. 54, 42 N.E.2d 766; *State, ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82; and *Wolf v. Ohio State Univ. Hospital*, 170 Ohio St. 49, 162 N.E.2d 475, approved and followed.)

* * *

"3. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, which provides that ' * * * Suits may be brought against the state in such courts and in such manner, as may be provided by law,' is not self-executing, and statutory consent is a prerequisite to such suit. (*Raudabaugh, Palumbo, Williams* and *Wolf, supra*, approved and followed.)

* * *

"4. Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

Therefore, even ignoring the Eleventh Amendment, it is established, and recently confirmed, that Ohio is immune to suit in its state courts. Consequently, under the same Ohio law, the State cannot be sued in the United States District Courts sitting in Ohio.

The Ohio case of *State, ex rel. Williams, v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947) is analogous to the federal law affirmed in *Dugan v. Rank, supra*. In *Glander*, the Ohio Supreme Court, quoting and adopting 42 *American Jurisprudence*, 304, Section 92, stated the Ohio test for determining when an action is against the state, brought through nominal party defendants:

"While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission, or department in his or its

> official capacity when the real claim is against the state itself, and the state is the party vitally interested. If the rights of the state would be directly and adversely affected by the judgment or decree sought, the state is a necessary party defendant, and if it cannot be made a party, that is, if it has not consented to be sued, the suit is not maintainable. The state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court." *(State, ex rel. Williams, v. Glander, supra,* 148 Ohio St. at 193).

Under analogous reasoning as that contained in *Gregoire v. Biddle, supra,* and *Barr v. Matteo, supra,* it is apparent that, pursuant to the tests defined in the *Glander* case, Ohio is "vitally interested" in petitioners' diversity actions, and that "the rights (and obligations) of the state would be directly and adversely affected by the judgment." Hence, in accordance with the established law of Ohio, the State is immune to petitioners' diversity causes of action.

C. *Section 5923.37, Ohio Revised Code.*

Referring to Section 5923.37, Ohio Revised Code, petitioners declare that "this statute supercedes and waives any immunity otherwise available to the State of Ohio (Pet. 23)." Section 5923.37 provides:

> *"When a member of the organized militia* is ordered to duty by state authority during a time of public danger, *he is not answerable* in a civil lawsuit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct." (Emphasis added)

The rule of construction, under both the federal and state law, is established that alleged statutory consents of

the sovereign to suit are to be strictly construed. *See, e.g., Ford Motor Co. v. Treasury Department, supra,* 323 U.S., at 465; *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 54 (1944); *Lee Turzillo Contr. Co. v. Cincinnati Met. Hous, Auth.,* 10 Ohio St.2d 5, 225 N.E.2d 255 (1967). Obviously, the subject of Section 5923.37, Ohio Revised Code, is "a member of the organized militia"; not the State of Ohio. *Even the most strained construction of this section,* that still borders legitimacy, could not result in the section constituting Ohio's waiver of its Eleventh Amendment immunity to suit, nor the immunity constitutionalized by Article I, Section 16, Ohio Constitution.

Petitioners conclude:

> ". . . Moreover, to the extent that Ohio seeks to claim sovereign immunity . . . , the application of the doctrine of sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf, the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause, Admr. v. State of Ohio, supra* (31 Ohio St.2d 132, 285 N.E.2d 736 (1972)."

This argument has previously been foreclosed by this Court's dismissal of the appeal in *Krause, Admr. v. Ohio, supra,* for want of a substantial federal question (34 L.Ed. 2d 506).

IV. *The Allegations of Petitioners' Complaints Concerning the Propriety of Training and Weaponry of the Ohio National Guard Raise Non-Justiciable Political Questions.*

Petitioners' complaints allege that the respondents ordered improperly trained and inappropriately armed national guard troops onto the Kent State University Campus resulting in the death of Allison Krause and

Jeffrey Miller (Pet. 47-57). Compensatory and punitive damages constitute the requested relief (Pet. 51-52, 56-57). The questions raised herein closely parallel the issue presently before this Court in the case of *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), *cert. granted sub nom., Gilligan v. Morgan*, 34 L.Ed.2d 217 (1972). Although the *Morgan* case concerns a prospective injunctive action involving the future training and weaponry of the Ohio National Guard, the retroactive relief sought herein yields a similar nonjusticiable, political question.[7]

The indicia for determining the presence of a political question are defined by this Court in *Baker v. Carr*, 369 U.S. 186 (1962):

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from

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[7] Respondents respectfully call this Court's attention to the informative Brief for the United States as Amicus Curiae filed by The Honorable Erwin N. Griswold on behalf of the Department of Army in the *Morgan* case.

> multifarious pronouncements by various departments on one question." (369 U.S. at 217)

As is indicated in *Baker* (369 U.S. at 217) the presence of any one of these factors justifies dismissal under the political question doctrine. In the instant cases, all of the defined elements are present.

First, there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Article I, Section 8, Clause 16, of the Constitution, places with Congress the power to prescribe weaponry and discipline for the Militia. Congress, acting within this constitutional delegation of authority, has enacted law providing for the training of the Army National Guard, 32 U.S.C. Section 501 (See also, 32 U.S.C. §§502-507). Likewise, Congress has prescribed the arms and equipment issued to the Army National Guard, 32 U.S.C. Section 701. In addition, Congress has authorized the President to prescribe regulations governing the Army National Guard and has given the executive the means to enforce the regulations which he and Congress promulgate, 32 U.S.C. Sections 110, 108, respectively.[8]

Secondly, the judicial branch of government lacks both the physical capabilities and technical skills to deal with the complex military issues raised by petitioners. Traditional rules dictate that the courts are restricted to the evidence presented and arguments of adversaries. Adequate machinery to test, observe, and thereafter evaluate, the alternative training methods and techniques governing civil disturbance control is not available, nor does the judiciary possess the means to experiment with the many,

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[8] For a thorough discussion of the Federal Government's historic and pragmatic involvement in the *unitary* training and arming of the State's national guard components, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

and ever-changing, weapons on the market. Further, the judiciary has neither the time nor the prerogative to conduct the extensive and ongoing investigatory hearings demanded by these complex administrative questions, vital to a sophisticated resolution to the problems. Both the legislature and executive, acting through the Department of Army, do have the necessary physical capabilities to rationally deal with the issues.

Not only is the judiciary physically ill-suited but it is also restricted to a narrow field of legal expertise. Inquiries into and solutions to questions of military tactics are clearly foreign to the judiciary's area of competence. A federal trial court would indeed be hard pressed to fairly instruct a jury on the military issues presented herein. Equally, if not more precarious, would be the plight of twelve laymen when called upon to make technical, factual determinations concerning the appropriateness of the training and weaponry provided to the States' national guard components by the Department of Army.

Thirdly, an isolated judicial precedent relative to these administrative matters would generate a myriad of questions and stymie effective law enforcement. For instance, could the Department of Army modify, and perhaps improve, the judicially endorsed military pronouncements arising from this case without subsequent judicial policy determinations? Would a judicial precedent in this isolated situation control future campus disturbances presenting factual realities not identical to those of May 4, 1970? If the judicial pronouncements and Department of Army regulations were in conflict, which directives would control? Would the judiciary be required to supervise the weekend drills and summer encampments of the national guard to assure the judicial policies were carried out? Who would determine, in the heat of insurrection, whether

future riotous conditions fell within the facts and precedent established by this case?

These questions are raised to demonstrate the quagmire upon which future military commanders, the Department of Army, *and the judiciary* would be placed if this Court were to hold petitioners' allegations justiciable. In dealing with civil disorder the government must be able to act immediately and confidently lest the delay and doubt insure the success of the insurgency. This vital assurance and split second flexibility demanded by military confrontations are not characteristics of our relatively rigid legal system bound by the ties of narrowly drawn precedent.

A judicial determination herein would indicate disrespect for the legislative and executive branches of government. As herebefore demonstrated, Congress is vested by the Constitution with authority and the responsibility for training and providing weapons to members of the national guard. The President also has been delegated the responsibility of prescribing regulations controlling these matters. A judicial review into the propriety of these administrative decisions would express disrespect and a lack of confidence in these coordinate branches of government to wisely and faithfully fulfill their duties.

Finally, decision by the judiciary would also create the potentiality of multifarious, and even conflicting, pronouncements by the various branches on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. *See, e.g.*, 32 U.S.C. §501, *et seq.*, and 32 U.S.C. §701. Congress may enact new statutes or amend existing statutes in the future. The President has prescribed regulations concerning the training of the national guard; he also may prescribe new regulations on the subject in the

future. If courts attempt to adjudge the training and weaponry of the national guard, there is an eminent possibility that such a mandate would conflict with either existing or future directives from Congress and/or the President.

In the case of *Orloff v. Willoughby*, 345 U.S. 83 (1952), this Court was confronted with similar administrative decisions coming at loggerheads with the asserted rights of a citizen. Therein, this Court concluded:

> " . . . But judges are not given the task of running the Army . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters . . . It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of military authorities (345 U.S. at 93-95)."

Both the legislative and executive branches of government have formulated considered directives concerning the training and weaponry provided to the national guard. New and advanced policies and equipment will evolve with the inevitable innovation of military technology. These past and future decisions, promulgated by the co-ordinate political branches of government, must not be exposed to "disruptive" judicial process.

V. *The Federal Government Is an Indispensable Party to the Adjudication of Petitioners' Allegations Concerning the Training and Weaponry of the Ohio National Guard.*

The breadth of petitioners' fifth question presented for review (Pet. 4, 25) does not adequately portray the narrow

holding of the lower court. Rather than holding the Federal Government indispensable relative to *all* the claims contained in petitioners' complaints, the lower appellate court concluded that the United States was an indispensable party to the litigation of *those few claims challenging the training and weaponry of the Ohio National Guard* (Sch. App. 17a-19a). Rule 19(a) (2) (i) (ii), Fed.R.Civ.P., defines the relevant criteria upon which the Federal Government is determined a necessary party to the just adjudication of the allegations putting to issue the appropriateness of the training and weaponry provided the Ohio National Guard by the Federal Government.

First, a disposition of these issues would, as a practical matter, impair and impede the ability of the Federal Government to protect the national interests involved therein. Respondents have previously demonstrated the inextricable involvement of the Federal Government in the training and weaponry of the Ohio National Guard (ARGUMENT, IV., pp. 34-39 *supra*). Under the "effect" tests defined by this Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963), it is certain that the Federal Government's interests would be impaired and impeded by the adjudication of these claims. A judicial determination as to the propriety of the Militia's training and weaponry would not only interfere with the public administration of the law providing for the training and weaponry of the Militia [*Land v. Dollar*, 330 U.S. 731, 738 (1947)], but would also restrain the Federal Government from acting and/or compel the Federal Government to act in this critical area vitally affecting national security. [*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949)]

Secondly, and independent of the above, the officers of the Militia would face substantial risk of incurring inconsistent obligations. If a judicial decision differed from the

directives promulgated by the Department of Army, the officers of the Militia, pledged to each, would be placed in jeopardy when deciding to which-master to pay their allegiance. Pursuant to Rule 19(a) (2) (i) (ii), the Federal Government is a necessary party to petitioners' claims that the Ohio National Guard was improperly trained and armed May 4, 1970.

It stands without citation that the Federal Government cannot be made a party to the adjudication of petitioners' claims concerning the training and weaponry provided Ohio's Militia. Rule 19(b), Fed.R.Civ.P., contains practical and pragmatic considerations for determining when claims involving necessary parties should be dismissed—the Rule 19(a) necessary parties thus becoming indispensable. *Shaugnessy v. Pedreiro*, 349 U.S. 48, 54 (1955). The ends to be achieved under these pragmatic standards of Rule 19(b) are those insuring equity and good conscience both to the parties of the lawsuit and those necessary parties not at bar.

Respondents, *under this portion of their ARGUMENT*, are not contending, nor has the lower appellate court held, that petitioners' complaints be dismissed *in toto* under Rule 19(b). Rather, respondents contend that those allegations to which the Federal Government is a necessary party were properly dismissed by the lower court. The equities of Rule 19(b) demand the protection of the Federal Government's interests by dismissing petitioners' allegations concerning the training and weaponry of the Ohio National Guard, leaving petitioners' remaining allegations intact to face respondents' arguments set forth in the earlier sections of this brief.

CONCLUSION

Respondents respectfully submit that the instant case is not an appropriate one for this Court to exercise its jurisdiction. None of the considerations specified in Rule 19 of the Rules of this Court are present. The substance of the Petition for Certiorari is that petitioners disagree with the findings and decisions of the court below. This is not sufficient to justify review on certiorari. *See, e.g., Magnum v. Coty*, 262 U.S. 159, 163 (1923).

There is no federal question of substance which requires resolution. The finding of the courts below, that the complaints failed to state a claim against respondents, is an adequate basis to support the decision. The complaints allege in general and conclusory terms that the governor, the adjutant general, and certain named officers of the Ohio National Guard were guilty of wanton, willful and negligent conduct by ordering the National Guard to duty when they knew there was no cause to do so; and when they knew the troops were not properly trained. In ruling on a motion to dismiss, a court must accept as true all well pleaded factual allegations. However, it need not accept legal conclusions in the form of factual allegations, facts which are not supported or facts which are in conflict with facts judicially known to the court.

The complaints herein do not contain facts which support the contentions that there was no cause to order the troops to duty and the troops were not properly trained. In addition, the executive proclamations attached to the motions to dismiss affirmatively show that there was a need for the National Guard to act in aid of the civil authorities to restore order. The courts below properly refused to accept as true the conclusory allegations of the complaint and properly determined that there were no well pleaded

factual allegations which stated a claim against respondents upon which relief could be granted.

In addition, the determination of the lower courts may be supported on several other grounds. The Eleventh Amendment, United States Constitution and Article I, Section 16 of the Ohio Constitution prohibit the federal courts from assuming subject matter jurisdiction. The allegations of the complaints putting to issue the training and weaponry of the Ohio National Guard involve non-justiciable determinations of a political nature. Finally, those allegations specifically mentioned above, demand dismissal since the Federal Government is an indispensable party to their resolution.

The decision of the courts below is clearly correct. There is no federal question of substance to be determined by this Court.

Respondents therefore respectfully submit that the petition should be denied.

Respectfully submitted,

CHARLES E. BROWN, Counsel of Record
ROBERT F. HOWARTH, JR., Of Counsel
WILLIAM W. JOHNSTON, Of Counsel

DELMAR CHRISTENSEN, Attorney for
Harry D. Jones and John E. Martin

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Raymond J. Srp

Attorneys for Respondents

APPENDIX

AFFIDAVIT OF ADJUTANT GENERAL SYLVESTER DEL CORSO

(Filed August 17, 1970)

ARTHUR KRAUSE, Administrator of
The Estate of ALLISON KRAUSE,
deceased.
Plaintiff,

vs.

GOVERNOR JAMES RHODES, ET AL.,
Defendants.

Civil Action No. C 70-544
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

Adjutant General Sylvester Del Corso, being duly sworn, deposes and says:

* * *

4. At the time plaintiff's alleged cause of action arose, I was in Columbus, Ohio, and not on the Kent State Campus.

* * *

/s/ Adjutant General Sylvester Del Corso

SWORN TO BEFORE ME and subscribed in my presence this 3rd day of August, 1970.

/s/ Robert F. Howarth, Jr.
Notary Public—State of Ohio
Lifetime Commission

AFFIDAVIT OF BRIGADIER GENERAL ROBERT CANTERBURY

(Filed August 17, 1970)

ARTHUR KRAUSE, Administrator of
The Estate of ALLISON KRAUSE,
deceased.
Plaintiff,

vs.

GOVERNOR JAMES RHODES, ET AL.,
Defendants.

Civil Action No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

Brigadier General Robert Canterbury, being duly sworn, deposes and says:

* * *

4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause.

* * *

/s/ Assistant Adjutant General and
Brigadier General Robert Canterbury

SWORN TO BEFORE ME and subscribed in my presence this 3rd day of August, 1970.

/s/ Robert F. Howarth, Jr.
Notary Public—State of Ohio
Lifetime Commission

AFFIDAVIT OF SERVICE

STATE OF OHIO
COUNTY OF FRANKLIN } SS

I, ROBERT F. HOWARTH, JR., an attorney in the office of Charles E. Brown, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin and Srp, herein, depose and say that on this 4 day of May, 1973, I served three copies of the foregoing brief in opposition on Steven A. and Joseph M. Sindell, Sindell, Sindell, Bourne, Stern & Spero, 1400 Leader Building, Cleveland, Ohio 44114; and, Joseph Kelner, Kelner, Stelljes, and Glotzer, 217 Broadway, Suite 600, New York, New York 10007, attorneys for petitioners, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to each of the attorneys above at their designated address, being the only parties hereto required to be served.

Robert F. Howarth, Jr.

ROBERT F. HOWARTH, JR.

Subscribed and sworn to before me this 4 day of May, 1973.

Thomas J. Moyer

~~WILLIAM H. ALLEN, JR.~~
Attorney-At-Law
Notary Public—State of Ohio
My Commission Has No Expiration Date
Section 147.03, O.R.C.

THOMAS J. MOYER, Attorney at Law
NOTARY PUBLIC — STATE OF OHIO
LIFETIME COMMISSION